

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No. 2009-1149
)	
Plaintiff-Appellant,)	On Appeal from the
)	Lake County Court of Appeals,
v.)	Eleventh Appellate District
)	
JAMES LESLIE DYE)	
)	
Defendant-Appellee.)	Court of Appeals Case No. 2008-L-106

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT STATE OF OHIO

CHARLES E. COULSON (0008667)
PROSECUTING ATTORNEY
LAKE COUNTY, OHIO

Teri R. Daniel (0082157) (COUNSEL OF RECORD)
ASSISTANT PROSECUTING ATTORNEY
Administration Building
105 Main Street, P.O. Box 490
Painesville Ohio 44077
(440) 350-2683 Fax (440) 350-2585
tdaniel@lakecountyohio.gov

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COUNSEL FOR APPELLANT, STATE OF OHIO

Michael B. Bowler (0013026)
Matthew L. Rizzi Jr. (0080773)
Blakemore, Meeker & Bowler Co., L.P.A.
19 North High Street
Akron, OH 44308

COUNSEL FOR APPELLEE, JAMES LESLIE DYE

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

1. The Eleventh District Court of Appeals has perverted a decision of this Court (*State v. Carpenter*, 68 Ohio St.3d 58, 1993-Ohio-226, 623 N.E.2d 66), rendering it meaningless.

2. The Eleventh District Court of Appeals has used a standard of review of the trial court's decision which is contra to other Ohio appellate courts. When reviewing a trial court's denial of a motion to dismiss that requires analysis of both the facts and the law, a majority of the appellate courts defer to the findings of fact as determined by the trial court, if based upon some competent, credible evidence, and then apply the substantive law to the facts de novo. The Eleventh District Court of Appeals, however, failed to give deference to the facts determined by the trial court and instead, reviewed the facts de novo. A decision of this Court is necessary to clarify the standard of review for a motion to dismiss.

3. The issue of which law to apply when all of the elements but one of a homicide offense occurred prior to a change in the law, and the last element, i.e. death, occurred after a new statute was enacted is one of first impression in the State of Ohio and of great statewide interest.

STATEMENT OF THE CASE AND FACTS

On August 10, 1999, Defendant Dye was drunk and driving his pickup truck with a suspended license. He smashed into thirteen-year-old Robert Arnold, while Robbie was retrieving the mail from the roadside mailbox in front of his family's home. The force of the impact threw Robbie 75 feet into a ditch. Mail was strewn across the ground, and Robbie's loose moccasin remained frozen in place, off the roadway, where he was standing at the time of the impact. There were no skid marks. Robbie was life-flighted to Metro Health Medical Center.

Defendant Dye reeked of alcohol, his eyes were bloodshot and glassy, and his speech was slurred. At the scene, Dye was screaming "I just killed a kid." Due to his appearance of intoxication and his admissions, Dye was arrested. He admitted to drinking seven beers and refused sobriety tests before requesting an attorney. Dye claimed that Robbie had run out into the road in front of his truck. The evidence found at the scene, including the location of the damage to the defendant's vehicle, location of the bruising on Robbie's body, and the location of Robbie's moccasin, proved otherwise.

Robbie suffered dislocation between the base of his skull and first vertebra, a tear in his aorta, a closed head wound, blood in his ventricles, fractures to his right tibia and fibula, and a left leg laceration. As a result, Robbie was permanently rendered a quadriplegic and required a ventilator for the rest of his life just to breathe.

On September 28, 1999, Defendant Dye was indicted on the following charges in Lake County Common Pleas Case No. 99-CR-000371:

Count 1, Aggravated Vehicular Assault, a felony of the fourth degree, in violation of R.C. 2903.08; and,

Count 2, Driving While Under the Influence of Alcohol or Drugs, a misdemeanor of the first degree, in violation of R.C. 4511.19.

Count 1 listed three specifications:

First, that Defendant Dye was under the influence of alcohol or a drug of abuse during the commission of the offense;

Second, that Defendant Dye was driving under suspension during the commission of the offense; and,

Third, that Defendant Dye had previously been convicted of Driving Under the Influence of Alcohol or Drugs.

Each specification to Count 1 would require the Court to impose a mandatory term of prison. If Defendant pleaded to more than one specification, all of the specifications would merge. No greater penalty could be imposed upon the Defendant whether he pleaded to just one or all of the specifications.

No plea negotiations occurred between the State and Defendant. After discovery was provided, Defendant chose to enter a plea of guilty. On November 5, 1999, Defendant Dye, in open court, pleaded "guilty" to both counts of the indictment as well as the first specification to Count 1. As pleading guilty to one specification had the same effect as pleading to all three specifications, the Assistant Prosecuting Attorney, in order to clean up the record, requested that the trial court nolle the remaining two specifications as being duplicative.

The trial judge taking the change of plea was a visiting judge. After the change of plea the trial judge was going to revoke bond. The Assistant Prosecuting Attorney was

surprised and recommended that bond be continued, which was the usual and customary way in which cases were handled in Lake County between change of plea and sentencing.

Dye was sentenced on December 9, 1999. Robbie was in the courtroom and personally addressed the trial court. The Assistant Prosecuting Attorney argued that only the maximum sentence was appropriate for Dye's conduct. The trial court agreed, sentencing Defendant Dye to 18 months in prison, the maximum permitted by law.

On December 26, 2006, Robbie succumbed to the debilitating injuries he sustained in the accident. An autopsy completed at the Cuyahoga County Coroner's Office determined the manner of death was homicide. The Lake County Coroner certified the death certificate, ruling homicide as the manner of death. The cause of death and the ruling of the death as a homicide was never challenged and was agreed to by stipulations entered into by the State of Ohio and Defendant Dye.

On July 6, 2007, Defendant Dye was indicted by the Lake County Grand Jury for causing the death of Robbie Arnold. The indictment filed in the Lake County Common Pleas Case No. 07-CR-000443 contained three counts:

Count 1, Aggravated Vehicular Homicide, a felony of the first degree, in violation of R.C. 2903.06(A)(1)(a);

Count 2, Aggravated Vehicular Homicide, a felony of the second degree, in violation of R.C. 2903.06(A)(2)(a); and

Count 3, Aggravated Vehicular Homicide, a felony of the third degree, in violation of R.C. 2903.06(A).

The statute of Aggravated Vehicular Homicide R.C. 2903.06 had been changed by the General Assembly between the time of the accident on August 10, 1999 and the date of

Robbie Arnold's death on December 26, 2006. Thus, Counts 1 and 2 of the indictment were pursuant to the law in effect at the time of Robbie's death. Count 3 was charged under the law in existence in 1999, the time of Defendant Dye driving his car into Robbie Arnold. Under the law in existence in 2006, Dye could be convicted of a felony of the first degree. The prior law only allowed for a felony of the third degree.

Defendant Dye filed a motion to dismiss the indictment, claiming that the State failed to expressly reserve on the record its right to file additional criminal charges against him if the victim subsequently died. The State responded that Dye's original guilty plea was not the result of a negotiated plea agreement. Dye also filed a motion requesting application of the law in effect in 1999 when the original conduct occurred. The State argued that the crime of aggravated vehicular homicide did not occur until all of the elements of the crime were met, i.e., the victim's death, requiring application of the law in effect at the time of death.

After holding an evidentiary hearing, the trial court found that there was no plea agreement, that Dye did not plead to a lesser offense, and that Dye was sentenced to the maximum term of imprisonment authorized under law at the time. The trial court further found that the dismissal of two of the three specifications to Count 1 had no effect on the sentencing, and the transcript of the change of plea was completely devoid of any mention of a plea bargain or joint recommendation for sentence. The trial court then denied Dye's motion to dismiss. The trial court further found that the most recent amendment to R.C. 2903.06, in effect at the time of the death of Robbie Arnold, did not violate the ex post facto clause of the United States Constitution and was the proper statute to apply in this case. The trial court denied Defendant's motion to apply the older law.

On May 5, 2008, Defendant Dye withdrew his formerly entered plea of “not guilty” and pleaded “no contest” to Count 1 of the indictment, Aggravated Vehicular Homicide, a felony of the first degree, in violation of R.C. 2903.06(A)(1)(a). Based on Dye's stipulation to the State's facts, the trial court found Defendant Dye guilty. Dye was sentenced to serve nine years in prison on Count 1 with credit for the eighteen months that he served for his plea of guilty to Aggravated Vehicular Assault.

Dye filed an appeal raising two assignments of error: the first claiming that the State could not indict him for Aggravated Vehicular Homicide as the State failed to reserve on the record the right to bring additional criminal charges at the time of his earlier plea to Aggravated Vehicular Assault. The second claim was that the trial court erred by applying the version of R.C. 2903.06 at the time of Robbie Arnold's death, in violation of the ex post facto clause and retroactivity of clauses of the State and Federal Constitutions.

The Eleventh District Court of Appeals reversed the findings of fact of the trial Court, found that a negotiated plea had occurred, and reversed and vacated Dye's conviction. The appellate court did not address the second assignment of error.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I

STATE V. CARPENTER DOES NOT STAND FOR THE PROPOSITION THAT EVERY PLEA OF GUILTY IS A NEGOTIATED PLEA.

The Eleventh District Court of Appeals perverted the meaning of *State v. Carpenter*, 68 Ohio St.3d 58, 1993-Ohio-226, 623 N.E.2d 66, and applied it to *all* cases where there is a plea of guilty, regardless of whether it was negotiated. *Carpenter* held that the State cannot indict a defendant for murder after the trial court has accepted a *negotiated plea*

to a lesser offense and the victim later dies from injuries sustained during the crime, unless the State expressly reserves the right to file additional charges on the record. *Carpenter* at syllabus (emphasis added). Following the appellate court's logic, a defendant could plead guilty to the indictment at arraignment, and it would have the same *Carpenter* implications as a plea to reduced charges reached after extensive negotiations. The *Dye* decision rendered this Court's holding in *Carpenter* meaningless.

Rules of law from this Court are written precisely. Phrases such as "negotiated guilty plea" and "lesser offense" are not superfluous. The phrase "negotiated guilty plea to a lesser offense" does not encompass all pleas or that is what this Court would have stated. Pleading guilty to an indictment is not a negotiated plea. Similarly, pleading guilty to an indictment with the dismissal of duplicative specifications is not a negotiated plea and is certainly not the situation contemplated by *Carpenter*.

In *Carpenter*, the defendant was indicted on one count of felonious assault, a felony of the second degree. *Carpenter* at 60. After plea negotiations with the State, he entered a guilty plea to the lesser included offense of attempted felonious assault, a felony of the third degree, thus substantially reducing his exposure to prison. *Id.* Additionally, the State agreed to recommend the minimum sentence. *Id.*

This case is drastically different. In his 1999 case, *Dye* pleaded guilty to both counts in the indictment, and the State aggressively sought the maximum term of imprisonment. Under the old law, the sentence imposed for driving under the influence had to be served concurrently with the sentence imposed for aggravated vehicular assault, so *Dye* received the maximum term of 18 months. While the second and third specifications under Count

One were dismissed at the State's request, these specifications were duplicative of the first specification because they all mandated prison without affecting the length of the potential prison sentence. Their dismissal cleaned up the record; the specifications had no effect on what sentence could be imposed. Because there was not a negotiated plea, *Carpenter* does not apply.

Furthermore, *Carpenter* only applies when there is a negotiated plea of guilty to a lesser offense. *Carpenter* at syllabus. The Eleventh District Court of Appeals misinterpreted the "lesser offense" language of *Carpenter*.

We note that both the state and the trial court appear to have assumed that the "lesser offense" referenced in *Carpenter* must be a lesser included offense of the crime charged. Mr. Carpenter pleaded guilty to attempted felonious assault, which is a lesser included offense of felonious assault. [*Carpenter*] at 60. However, the syllabus in *Carpenter* provides that the state may not indict for murder, on the death of a victim, if the defendant has previously pleaded guilty to "a lesser offense." Thus, the fact that, in this case, the trial court only nolle two lesser specifications on Mr. Dye's aggravated vehicular assault charge, and that he pleaded guilty to the most serious form of aggravated vehicular assault, does not seem pertinent. Certainly aggravated vehicular assault, in any form, is a lesser offense than homicide.

Dye at fn.1. The court of appeals confused what the term "lesser offense" modifies. The Eleventh District Court of Appeals used "lesser offense" to mean a lesser offense than homicide. But the original crime with which a defendant is charged will always be a lesser offense than the crime of homicide. Thus, the term "lesser offense," as used in *Carpenter*, logically must modify the phrase "negotiated guilty plea," that is, it demonstrates the existence of a negotiated agreement. Therefore, *Carpenter* only applies in situations where a defendant pleads guilty to a lesser offense than the charges in the original indictment.

PROPOSITION OF LAW NO. II

IN REVIEWING A TRIAL COURT'S DENIAL OF A MOTION TO DISMISS, THE APPELLATE COURT MUST DEFER TO THE TRIAL COURT'S FACTUAL FINDINGS AND APPLY THE SUBSTANTIVE LAW TO THE FACTS DE NOVO; THUS, WHEN AN EVIDENTIARY HEARING IS HELD, THE APPELLATE COURT IS BOUND TO ACCEPT THE FACTS AS FOUND BY THE TRIAL COURT SO LONG AS THEY ARE BASED ON COMPETENT, CREDIBLE EVIDENCE.

Without any discussion of the trial court's findings of facts, the Eleventh District Court of Appeals used a de novo standard of review and found that the trial court erred in denying Dye's motion to dismiss the indictment. Properly, the court of appeals should have applied a hybrid standard of review and should have given deference to the conscientious findings of the trier of fact.

Generally, when reviewing a trial court's decision to deny a motion to dismiss, an appellate court should defer to the trial court's factual findings then independently determine, as a matter of law, whether the trial court erred in applying the substantive law to the facts of the case under a de novo standard of review. *State v. Gilchrist*, 4th Dist. No. 02CA26, 2003-Ohio-2601, at ¶13, citing *State v. James*, 4th Dist. Nos. 00CA546-00CA551, 2001-Ohio-2583 and *State v. Fleming* (April 25, 1997), 11th Dist. No. 96-P-0210. But in some cases where the denial of the motion to dismiss is based on a purely legal question and the facts are not in dispute, appellate courts simply rely on a de novo standard of review. See, e.g., *State v. Dobbins*, 9th Dist. No. 08CA9498, 2009-Ohio-2079 (finding that motion to dismiss based on defective indictment is reviewed de novo); *State v. Williams*, 6th Dist. No. WD-07-079, 2008-Ohio-2730 (finding that motion to dismiss based on double jeopardy is reviewed de novo); *State v. Collins*, 12th Dist. No. CA2007-01-010, 2007-Ohio-

5392 (finding that motion to dismiss based on double jeopardy is reviewed de novo); *State v. Vanderpoll*, 9th Dist. No. 22803, 2006-Ohio-526 (finding that motion to dismiss based on subject matter jurisdiction and venue is reviewed de novo).

In this case, the Eleventh District Court of Appeals simply used a de novo standard of review, without any explanation or discussion of the facts. The appellate court relied on *State v. Palivoda*, 11th Dist. No. 2006-A-0019, 2006-Ohio-6494, which involves a purely legal question. In *Palivoda*, the court of appeals reviewed a trial court's grant of a motion to dismiss based on the State's failure to preserve evidence. *Id.* at ¶¶2-3. There was no question that the evidence had been destroyed; the appellate court's sole determination was whether the dismissal of the indictment was proper. Dye's motion to dismiss, however, was based on *Carpenter*, which sets forth a three-part test. A motion to dismiss based on the *Carpenter* test establishes a situation where facts are required as part of the analysis.

The *Carpenter* three-part test requires fact-finding by the trial court. The trial court found at an evidentiary hearing that there was no evidence of a negotiated plea and set forth its reasoning. The Eleventh District Court of Appeals should have deferred to those factual findings because they were supported by competent, credible evidence. The trial court found that Dye did not plead to a lesser offense. Specifically, the trial court found he pleaded to the charges in the indictment, he was sentenced to the maximum term of imprisonment authorized under the law at the time, he was aware of the severity of Robbie's injuries, he did not contest his guilt, and the dismissal of the specifications had no effect on the sentence imposed. Additionally, the transcript is completely devoid of any

mention of a plea bargain or joint recommendation for sentence. If the court of appeals found that the factual findings were not supported by competent, credible evidence, there was simply no discussion or analysis in their opinion.

PROPOSITION OF LAW NO. III

A DEFENDANT CANNOT BE CHARGED WITH A CRIME UNTIL EACH ELEMENT OF THE OFFENSE HAS BEEN COMPLETED; THUS, WHEN ALL BUT ONE OF THE ELEMENTS OF A HOMICIDE OFFENSE OCCURRED PRIOR TO A CHANGE IN THE LAW, AND THE LAST ELEMENT, I.E. DEATH, OCCURRED AFTER THE NEW LAW WAS ENACTED, THE LAW IN EFFECT AT THE TIME OF THE VICTIM'S DEATH IS CONTROLLING.

The Eleventh District Court of Appeals was presented with two assignments of error in this case. By granting the first assignment of error, the appellate court avoided ruling on the second assignment of error, and the latter is of great statewide interest. This case is one of first impression in the State of Ohio, and by accepting this proposition of law, this Court can provide the needed guidance.

Dye was indicted for aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a). The State must prove: (1) as a proximate result of committing a violation of R.C. 4511.19(A), R.C. 1547.11(A), R.C. 4561.15(A)(3), or of a substantially equivalent municipal ordinance; (2) the defendant caused another's death; (3) while operating; (4) a motor vehicle. In this case, elements (1), (3), and (4) took place in 1999. The statute was later amended, then Robbie died in 2006.¹ The State cannot charge a defendant with a

¹On December 27, 2006, the Cuyahoga County Coroner's Office determined the manner of Robbie's death to be homicide. Pursuant to R.C. 313.19:

The manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner

violation of R.C. 2903.06 until a victim dies as a result of the defendant's conduct. Until the death of the victim, the defendant may be guilty of aggravated vehicular assault for striking the victim while intoxicated, but the homicide charge is not proper until the date of the victim's death. Therefore, a defendant should be charged with the law in effect on the date of the crime, that is, the law in effect on the date of the victim's death.

Dye took a contrary stance. He argued that even though the crime of aggravated vehicular homicide was not complete until 2006, he could only be charged with the crime as it existed in 1999, at the time of his conduct. Dye suggested that charging him under the amended statute amounted to a violation of the ex post facto and retroactivity clauses. Aggravated Vehicular Homicide was a felony of the third degree in 1999, but by 2006, it had been increased by the legislature to a felony of the first degree.

Ultimately, Dye pleaded no contest to the aggravated vehicular homicide charge as it existed in 2006. Unfortunately, the Eleventh District Court of Appeals declined to review the second assignment of error in this case, and neither side is any closer to an answer of the predominant issue: which law is appropriate in a situation where the defendant's conduct occurs, the statute is amended, and then the victim dies as a direct result of the defendant's conduct?

Dye contended that he was presumed to know the law in existence at the time of his conduct in 1999. R.C. 2903.06 has been amended several times since the date of the

and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death.

The coroner's verdict was never challenged, and Dye never contested causation.

incident, and each time the legislature made the crime more serious in terms of degree or penalty. Dye should expect to be held responsible for the consequences of his actions. The State needs guidance in prosecuting cases where a victim dies after the law relating to the defendant's conduct has changed.

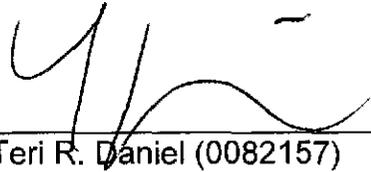
CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and presents a substantial constitutional question. Appellant respectfully requests that this Honorable Court grant jurisdiction and hear this case so that these important issues may be resolved.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

By:



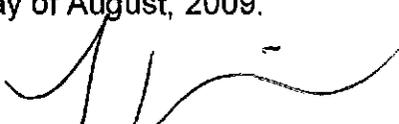
Teri R. Daniel (0082157)
Assistant Prosecuting Attorney
Counsel of Record

COUNSEL FOR APPELLANT
STATE OF OHIO

Administration Building
105 Main Street
P.O. Box 490
Painesville, Ohio 44077
(440) 350-2683 Fax (440) 350-2585

PROOF OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Michael B. Bowler, Esquire, Blakemore, Meeker & Bowler Co., L.P.A., 19 North High Street, Akron, OH 44308, on this 4th day of August, 2009.



Teri R. Daniel (0082157)
Assistant Prosecuting Attorney

APPENDIX

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO,

:

OPINION

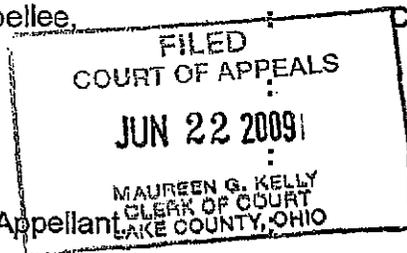
Plaintiff-Appellee,

CASE NO. 2008-L-106

- vs -

JAMES LESLIE DYE,

Defendant-Appellant



Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000443.

Judgment: Reversed; sentence vacated.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Michael B. Bowler and *Matthew L. Rizzi, Jr.*, Blakemore, Meeker & Bowler Co., L.P.A., 19 North High Street, Akron, OH 44308 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} James Leslie Dye appeals from the judgment entries of the Lake County Court of Common Pleas, denying his motions to dismiss, and to apply the aggravated vehicular homicide statute existing in August 1999 to his case. Mr. Dye was eventually sentenced to a nine year term of imprisonment, less eighteen months previously served for aggravated vehicular assault. We reverse, and vacate Mr. Dye's sentence.

{¶2} August 10, 1999, Mr. Dye, operating his Dodge pickup while under suspension, struck thirteen year old Robbie Armstrong as the latter retrieved his family's

mail at their home in Concord Township, Lake County, Ohio. Robbie was thrown some seventy-five feet, and suffered injuries leaving him a quadriplegic, perpetually dependent on a breathing machine. Peace officers responding to the scene found Mr. Dye extremely agitated, insisting Robbie had run in front of his truck. Mr. Dye smelled of alcoholic beverages, slurred his speech, and admitted to consuming seven beers. He was placed under arrest, but refused any breathalyzer test.

{¶3} September 28, 1999, Mr. Dye was indicted by the Lake County Grand Jury on two counts: Count One, aggravated vehicular assault, in violation of R.C. 2903.08, a fourth degree felony; and, Count Two, driving while under the influence of alcohol or drugs, in violation of R.C. 4511.19, a first degree misdemeanor. Count One carried three specifications: (1) that Mr. Dye was under the influence of alcohol or drugs during the commission of the offense; (2) that he was driving under suspension when he committed the offense; and, (3) that he had been convicted previously for driving under the influence. Mr. Dye pleaded not guilty.

{¶4} November 5, 1999, Mr. Dye, represented by counsel, appeared before the trial court to change his pleas. He entered a plea of guilty to Count One, aggravated vehicular assault, along with the first specification. At the state's behest, the trial court nolledd the remaining specifications to Count One. Mr. Dye further pleaded guilty to Count Two, driving under the influence. On the state's recommendation, Mr. Dye's bond was continued pending sentencing. Sentencing hearing was held December 9, 1999. The state asked for the maximum sentence, which Mr. Dye received: eighteen months for aggravated vehicular assault, and six months for driving under the influence, to be served concurrently.

{¶5} Mr. Dye was released from prison June 6, 2001.

{¶6} December 26, 2006, Robbie Arnold died from complications attendant upon his quadriplegia. December 27, 2006, an autopsy was performed on Robbie's remains by the Cuyahoga County Coroner, who ruled his death a homicide.

{¶7} July 6, 2007, the Lake County Grand Jury indicted Mr. Dye in three counts: Count 1, aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1)(a), a first degree felony; Count 2, aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2)(a), a second degree felony; and, Count 3, aggravated vehicular homicide, in violation of R.C. 2903.06(A), a third degree felony. The first two counts follow the law as it existed at Robbie's demise; the third, the law as it existed in 1999, when this tragedy commenced. August 10, 2007, Mr. Dye filed a written waiver of his right to appear at arraignment, and the trial court entered pleas of not guilty on his behalf.

{¶8} October 26, 2007, Mr. Dye moved the trial court to dismiss the indictment against him, on the authority of *State v. Carpenter* (1993), 68 Ohio St.3d 59, at the syllabus, which provides: "The state cannot indict a defendant for murder after the court has accepted a negotiated guilty plea to a lesser offense and the victim later dies of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant's plea." Mr. Dye maintained that his 1999 plea to aggravated vehicular homicide was a "negotiated" plea, and pointed out that the state failed to reserve the right to bring further charges against him.

{¶9} November 5, 2007, Mr. Dye filed a second motion, requesting that the trial court apply the aggravated vehicular homicide statute as it existed in 1999 to his case. As he pointed out, that statute has been extensively amended in the interim. Under the former statute, the maximum penalty was as a third degree felony; under the statute as it existed at Robbie's death, the crime may be punished as a first degree felony. Mr. Dye maintained that application of the later version of the statute to him would violate the constitutional bans on ex post facto laws and retroactive laws.

{¶10} The state responded to Mr. Dye's motions; and, hearing was held before the trial court. March 25, 2008, the trial court filed two judgment entries. By one, it held that *Carpenter* did not apply to Mr. Dye's situation, since he neither pleaded to a lesser offense, nor was there sufficient evidence that his 1999 plea was "negotiated." By the second, the trial court rejected Mr. Dye's request that the former version of the aggravated vehicular homicide statute be applied to his case, holding that the act of homicide did not occur until Robbie's death in 2006.

{¶11} May 5, 2008, Mr. Dye withdrew his plea of not guilty, and pleaded no contest to Count 1 of the indictment. The trial court found him guilty. Sentencing hearing was had June 9, 2008. In addition to nine years imprisonment, less time served for his prior aggravated vehicular assault conviction, Mr. Dye was ordered to pay restitution to Robbie's family.

{¶12} July 2, 2008, Mr. Dye timely noticed this appeal, assigning two errors:

{¶13} "[1.] The trial court committed reversible error in denying Mr. Dye's Motion to Dismiss the Indictment. ***

{¶14} "[2.] The trial court committed reversible error in applying the later enacted version of R.C. § 2903.06 to Mr. Dye, in violation of the Ex Post Facto Clauses and Retroactivity Clauses of the State and Federal Constitution (sic). ***"

{¶15} By his first assignment of error, Mr. Dye challenges the trial court's denial of his motion to dismiss based on *Carpenter*, supra. In that case, Jeffrey Carpenter was indicted for felonious assault, due to a stabbing occurring September 6, 1984. *Id.* at 60. January 17, 1985, following negotiations between the parties, the state and Mr. Carpenter entered a plea deal, whereby he agreed to plead guilty to the lesser included offense of attempted felonious assault, while the state agreed to recommend a minimum sentence, and maximum fine. *Id.* The state was aware at the time that Mr. Carpenter's victim was in a coma, and likely to die, but it made no reservation on the record for additional prosecution for homicide if that occurred. *Id.*

{¶16} The victim died March 28, 1986. *Carpenter* at 60. Mr. Carpenter was released from prison in September 1987. *Id.* In January 1988, Mr. Carpenter was indicted for murder. *Id.* He was granted motions to dismiss by the trial court three times; each time, the Tenth Appellate District reversed. *Id.* The Supreme Court of Ohio reversed the third holding of the Tenth District, ordering the indictment to be dismissed and Mr. Carpenter discharged. *Id.* at 62. After citing to *Santobello v. New York* (1971), 404 U.S. 257, 261, for the proposition that plea deals are a necessary part of the criminal justice system, the court quoted with approval the holding of the New Jersey Supreme Court in *State v. Thomas* (1972), 61 N.J. 314. In that case, the defendant was charged with robbery, assault with intent to rob, and atrocious assault and battery, after he knocked his victim down, and took her purse. *Carpenter* at 61. The defendant

pleaded guilty to atrocious assault and battery, while the remaining charges were dismissed. *Id.* The victim died, and the defendant was indicted for murder. *Id.* The New Jersey Supreme Court directed that the indictment be dismissed, holding, in relevant part:

{¶17} "From an examination of the record (***) we are convinced that the defendant anticipated that by pleading guilty to atrocious assault and battery, and then serving whatever sentence might be imposed, he was terminating the incident and could not thereafter be called upon to account further. We think, under all of the circumstances, that this expectation was entirely reasonable and justified." *Carpenter* at 61, quoting *Thomas* at 323.

{¶18} The Supreme Court of Ohio went on to hold:

{¶19} "In the present case, the state had actual knowledge of the alleged victim's condition at the time of the plea agreement and knew death was possible. Nevertheless, the state accepted a plea in which it agreed to reduce the charge of felonious assault to attempted felonious assault and recommend the imposition of a minimum sentence of two to ten years. By accepting a plea to a lesser included charge, the state obtained a definite prison term for the defendant and avoided the uncertainties of trial. In exchange, the appellant anticipated that by pleading guilty to attempted felonious assault, and giving up rights which may have resulted in his acquittal, he was terminating the incident and could not be called on to account further on any charges regarding this incident. We think this expectation was entirely reasonable and justified and that the prosecutor was aware of this expectation. Therefore, if the state wanted to

reserve its right to bring further charges later, should the victim die, the state should have made such a reservation a part of the record." *Carpenter* at 61-62.

{¶20} Mr. Dye contends his case is on all fours with that presented in *Carpenter*. He notes that, pursuant to the syllabus of *Carpenter*, he pleaded guilty in 1999 to a lesser offense than homicide – aggravated vehicular assault, and was sentenced accordingly.¹ He cites to a report dated June 5, 2008, from Dr. Frank P. Miller III, M.D., the Cuyahoga County Coroner, which is part of the Joint Stipulated Factual Statement in this case. In the report, Dr. Miller states that it was foreseeable that Robbie Armstrong would die of complications attendant upon his quadriplegia. Mr. Dye further notes that the state failed to reserve its right to prosecute him for homicide on the record at the time of his first plea.

{¶21} Finally, Mr. Dye contends that his 1999 plea was clearly a "negotiated" plea within the meaning of *Carpenter*. In so urging, he notes that the state was relieved from the uncertainties of trying him; that the state successfully moved the trial court to nolle prosequi the second and third specifications attendant upon the count of aggravated vehicular assault; and, that the state supported the continuance of his bond pending sentencing. In this regards, he cites to the opinion of this court in *State v. Wendt* (Dec. 3, 1993), 11th Dist. No. 93-P-0042, 1993 Ohio App. LEXIS 5767, for the proposition that agreement by the state to urge continuance of bond indicates the

1. We note that both the state and the trial court appear to have assumed that the "lesser offense" referenced in *Carpenter* must be a lesser included offense of the crime charged. Mr. Carpenter pleaded to attempted felonious assault, which is a lesser included offense of felonious assault. *Id.* at 60. However, the syllabus in *Carpenter* provides that the state may not indict for murder, on the death of a victim, if the defendant has previously pleaded guilty to "a lesser offense." Thus, the fact that, in this case, the trial court only nolle two lesser specifications on Mr. Dye's aggravated vehicular assault charge, and that he pleaded guilty to the most serious form of aggravated vehicular assault, does not seem pertinent. Certainly aggravated vehicular assault, in any form, is a lesser offense than homicide.

existence of a negotiated plea.

{¶22} We review a trial court's decision regarding whether to grant or deny a motion to dismiss de novo. *State v. Palivoda*, 11th Dist. No. 2006-A-0019, 2006-Ohio-6494, at ¶4. That is, we review the record and applicable law without deference to the judgment of the trial court. Having conducted that review, we find that this case falls within the parameter of *Carpenter*, and that the motion to dismiss should have been granted.

{¶23} The Supreme Court of Ohio has given some additional insight to its analysis in *Carpenter* in the case of *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807. In *Zima*, the Supreme Court of Ohio pointed out that *Carpenter* represented "a synthesis of contract and criminal law" as applied to a particular set of facts. *Zima* at ¶11. The *Zima* Court noted the foundation of the *Carpenter* decision was "that plea agreements are a necessary and desirable part of the administration of criminal justice and, therefore, "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."" *Id.*, citing *Carpenter*, quoting *Santobello* at 262. While the trial court noted this passage from *Zima*, there is additional analysis that should guide us in the instant case.

{¶24} The *Zima* case found that if the defendant reasonably anticipated that in giving up his right to a trial which may have resulted in his acquittal, the case should be concluded and he should not be called on to further account for any charges from that incident. *Id.* at ¶14. The *Zima* Court noted that the *Carpenter* Court recognized essentially an "implied promise" not to prosecute the defendant for further offenses that

might arise as a result of the defendant's conduct. *Id.* at ¶11. In line with this analysis, the *Zima* Court, citing *Carpenter* and *Thomas*, *supra*, points out the following:

{¶25} "Critically, in both *Carpenter* and *Thomas*, the defendant's expectation that his guilty plea would terminate the incident was inherently justified because the prosecutor and the court had jurisdiction over all the charges, both actual and potential, and because the negotiated guilty plea included the dismissal of all pending charges. In the absence of these or equivalent circumstances, however, it would be exceedingly difficult to sustain a defendant's belief that no further charges will be brought or prosecuted." *Zima* at ¶12.

{¶26} Therefore, under the facts of this case, the issues are (1) whether Mr. Dye reasonably believed his plea would end the matter, (2) whether he gave up substantial rights, and 3) whether the state received or gave up something in the plea negotiation process.

{¶27} It was the responsibility of the state, if they had this knowledge and intention to prosecute subsequent to the plea, to preserve potential future prosecution on the record at the 1999 plea hearing. As the Supreme Court of Ohio stated, "[t]he essence of [the *Carpenter*] holding is to require the state 'to reserve its right to file additional charges based upon the contingency of the death of the alleged victim.'" *Zima* at ¶9, quoting *Carpenter* at 61. This requirement ensures both parties to the plea agreement, as well as the trial court, have the same understanding when the plea is entered. Alternatively, there may be cases in which the state, in an attempt to secure a conviction, could intentionally forfeit its right to pursue additional charges.

{¶28} In this case, unlike in *Zima*, the prosecutor and the common pleas court were the same at all stages. The state professes there was no plea "agreement," since Mr. Dye, at the time of his 1999 plea, really did not receive anything. He pled to both counts in the indictment, and the lesser two of the three specifications were dismissed. The state also argues there was no agreement to give any favorable recommendation concerning sentencing and, therefore, the state gave up nothing at the time of the 1999 plea. By accepting the plea to aggravated vehicular assault without reserving its right to file additional charges upon the contingent death of the victim, the state gave up that right. In addition, as the court in *Zima* pointed out, the most critical thing the defendant did was give up his right to a trial at which he could have been acquitted. In addition, when the defendant waives his rights and the state does not have the risk of going to trial, there is always a benefit to the state.

{¶29} To understand the benefit given up by Dye, one need look no further than the plea hearing itself. The law demands an extensive colloquy between the court and the defendant prior to taking a plea, to ensure the defendant understands what he is giving up by entering the plea. Crim.R. 11(C). Indeed, this colloquy occurred at Dye's plea hearing before visiting Judge Robert Ford in 1999. The list is long, but includes the right to have the state prove each and every element of the offense beyond a reasonable doubt and to have the issues resolved by a jury, the right to confront and cross examine witnesses, the right to testify or not to testify, the right to counsel if you cannot afford one, and the right to compel the appearance of witnesses. Crim.R. 11(C). To suggest that there was no consideration for Dye's plea when he waived these rights is to ignore the dictate of *Zima* and *Carpenter*. Consideration is a benefit or detriment to

one party or the other. We cannot ignore the critical rights given up by the defendant and the significant benefit to the state.

{¶30} This combination of benefit to the state and detriment to Dye is sufficient consideration to bind any agreement. The devastating tragedy in this case is difficult to comprehend. However, under the facts, this result comports with the precedent established by both the Ohio and United States Supreme Courts.

{¶31} The first assignment of error has merit.

{¶32} We decline to reach the second assignment of error, finding it moot.

{¶33} The court respectfully acknowledges the superior quality of the briefs submitted by both parties on this appeal. They are models of lucid argumentation.

{¶34} The judgment of the Lake County Court of Common Pleas is reversed, and Dye's sentence is vacated.

{¶35} It is the further order of this court that appellee is assessed costs herein taxed.

{¶36} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

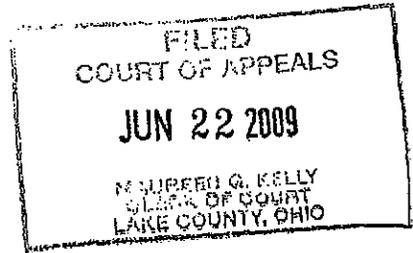
STATE OF OHIO,
Plaintiff-Appellee,

JUDGMENT ENTRY

CASE NO. 2008-L-106

- vs -

JAMES LESLIE DYE,
Defendant-Appellant.



For the reasons stated in the opinion of this court, the first assignment of error has merit. We decline to reach the second assignment of error, finding it moot. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is reversed, and appellant's sentence is vacated.

It is the further order of this court that appellee is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

JUDGE COLLEEN MARY O'TOOLE

FOR THE COURT